

1 bone cancer, degenerative spine disorder and rheumatoid arthritis,
2 with an onset date of January 1, 2003. (Tr. 126-27.) Benefits
3 were denied initially and on reconsideration. Plaintiff requested
4 a hearing before an administrative law judge (ALJ), which was held
5 before ALJ Hayward Reed on August 9, 2007. (Tr. 24-56.) Plaintiff,
6 who was not represented by counsel, appeared telephonically and
7 testified. (Tr. 26-50.) Vocational expert Joseph A. Moison (VE)
8 also testified. (Tr. 50-55.) The ALJ denied benefits on August
9 21, 2007, and the Appeals Council denied review. (Tr. 2-4, 11-23.)
10 The instant matter is before this court pursuant to 42 U.S.C. §
11 405(g).

12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript
14 of proceedings and are briefly summarized here. Plaintiff was 54
15 years old at the time of the hearing. He appeared telephonically
16 and waived his right to representation by an attorney on the record.
17 (Tr. 28.) He testified he was homeless, and lived in his truck most
18 of the time. (Tr. 32.) He stated he was divorced and had one year
19 of community college. He had worked as a cabinet maker and
20 woodworker for the last 20 years. (Tr. 32-35.) He testified he quit
21 working in December 2005 because he could no longer physically do
22 the job. (Tr. 35.) He reported he was severely limited in his
23 ability to lift, walk, sit, stand, stoop, crawl and reach due to
24 joint pain and parathyroidism. (Tr. 42-45.)

25 **ADMINISTRATIVE DECISION**

26 ALJ Reed found Plaintiff met insured status requirements for
27 DIB benefits through December 31, 2005. (Tr. 13.) At step one, he
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1 found Plaintiff had not engaged in substantial gainful activity
2 since March 1, 2006, the onset date established by the ALJ. (*Id.*)
3 At step two, he found that prior to March 1, 2006, Plaintiff had the
4 impairment of back pain, but it was not severe alone or in
5 combination with other impairments. (Tr. 14.) ALJ Reed determined
6 that Plaintiff's statements regarding limiting effects of his
7 symptoms were not entirely credible prior to March 1, 2006, noting
8 that there were no medical records from any health care providers
9 prior to that date. (Tr. 16.) He found beginning March 1, 2006,
10 Plaintiff had the severe impairments of degenerative disc disease of
11 the spine and thyroid disorders. (Tr. 17.) At step three, he
12 found these severe impairments, alone or in combination, did not
13 meet or medically equal an administratively recognized level
14 impairment listed in Appendix 1, Subpart P, Regulations No. 4
15 (Listings). (Tr. 19.)

16 The ALJ found at step four that Plaintiff had the residual
17 functional capacity to perform the full range of sedentary work, but
18 was unable to perform his past relevant work. (Tr. 20-21.)
19 Proceeding to step five, the ALJ applied the Medical Vocational
20 Guidelines and concluded Plaintiff was disabled as of March 1, 2006,
21 through the date of the decision, but was not disabled prior to his
22 date of last insured for DIB purposes. (Tr. 22-23.)

23 STANDARD OF REVIEW

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
25 court set out the standard of review:

26 A district court's order upholding the Commissioner's
27 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
28 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
Commissioner may be reversed only if it is not supported

1 by substantial evidence or if it is based on legal error.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
3 Substantial evidence is defined as being more than a mere
4 scintilla, but less than a preponderance. *Id.* at 1098.
5 Put another way, substantial evidence is such relevant
6 evidence as a reasonable mind might accept as adequate to
7 support a conclusion. *Richardson v. Perales*, 402 U.S.
8 389, 401 (1971). If the evidence is susceptible to more
9 than one rational interpretation, the court may not
10 substitute its judgment for that of the Commissioner.
11 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
12 F.3d 595, 599 (9th Cir. 1999).

13 The ALJ is responsible for determining credibility,
14 resolving conflicts in medical testimony, and resolving
15 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
16 Cir. 1995). The ALJ's determinations of law are reviewed
17 *de novo*, although deference is owed to a reasonable
18 construction of the applicable statutes. *McNatt v. Apfel*,
19 201 F.3d 1084, 1087 (9th Cir. 2000).

20 SEQUENTIAL PROCESS

21 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
22 requirements necessary to establish disability:

23 Under the Social Security Act, individuals who are
24 "under a disability" are eligible to receive benefits. 42
25 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
26 medically determinable physical or mental impairment"
27 which prevents one from engaging "in any substantial
28 gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."
42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

26 In evaluating whether a claimant suffers from a
27 disability, an ALJ must apply a five-step sequential
28 inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.

1 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
2 claimant bears the burden of proving that [s]he is
3 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
4 1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

5 It is the role of the trier of fact, not this court, to resolve
6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
7 supports more than one rational interpretation, the court may not
8 substitute its judgment for that of the Commissioner. *Tackett*, 180
9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
10 Nevertheless, a decision supported by substantial evidence will
11 still be set aside if the proper legal standards were not applied in
12 weighing the evidence and making the decision. *Browner v. Secretary*
13 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
14 there is substantial evidence to support the administrative
15 findings, or if there is conflicting evidence that will support a
16 finding of either disability or non-disability, the finding of the
17 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
18 1230 (9th Cir. 1987).

19 ISSUES

20 The question is whether the ALJ's decision is supported by
21 substantial evidence and free of legal error. Plaintiff argues the
22 ALJ erred when he found Plaintiff was not disabled prior to March 1,
23 2006. Specifically, he argues (1) the ALJ was required to consult
24 a medical expert to establish the onset of disability date, and (2)
25 substantial evidence does not support the ALJ's finding that prior
26 to March 1, 2006, Plaintiff's subjective symptom complaints were not
27 credible, but after this date, they were. (Ct. Rec. 14 at 12-16.)
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A. Duty to Develop the Record

An ALJ's duty to develop the record further is triggered when "there is ambiguous evidence or when the record is inadequate for proper evaluation of evidence." *Mayes v. Massanari*, 276 F.3d 453, 4509-60 (9th Cir 2001) (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)). Where a claimant is not represented by counsel, that duty is heightened; an ALJ must "scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts" and be "especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Vidal v. Harris*, 637 F.2d 710, 711 (9th Cir. 1981) (citing *Cox v. Califano*, 587

1 F.2d 988, 991 (9th Cir. 1978)). Remand to allow representation is
2 warranted if the lack of representation at the administrative
3 hearing resulted in prejudice or unfairness in the proceedings. See
4 *Hall v. Secretary of Health, Ed. and Welfare*, 602 F.2d 1372, 1378
5 (9th Cir. 1979).

6 Here, after the ALJ informed Plaintiff of his right to
7 representation in these proceedings, Plaintiff waived his right to
8 seek legal representation. (Tr. 27-28.) However, this did not
9 relieve the ALJ of his duty to explore all relevant facts or develop
10 the record where additional evidence is needed to support findings.
11 The transcript of the hearing shows that while the ALJ was informing
12 Plaintiff of his right to representation, Plaintiff clearly stated
13 he did not understand the significance of Title II claims and was
14 confused about the evidence requirements. (Tr. 36.) The ALJ
15 neither encouraged Plaintiff to seek representation nor did he allow
16 Plaintiff additional time to seek evidence of onset from his former
17 physician or his treating physician, Dr. Huebner.¹ Further, there
18 was no legal counsel to assist Plaintiff in requesting a continuance
19 for medical expert testimony to explain the progressive nature of
20 Plaintiff's impairments. Because Plaintiff did not understand the
21 implications of proving disability prior to his last date of

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23 ¹ During the hearing, Plaintiff referenced a 1996 diagnosis
24 from Dr. Eblin (Tr. 36, 38, 48.) It does not appear that either
25 the ALJ or Plaintiff attempted to contact Dr. Eblin or obtain
26 medical records after the hearing for review by the ALJ or the
27 Appeals Council. On remand, Plaintiff may submit records relevant
28 to the period prior to his last date of insured.

1 insured, and the ALJ did not meet his heightened duty to further
2 develop the record, Plaintiff was prejudiced by his lack of
3 representation. Remand is warranted not only to allow Plaintiff an
4 opportunity to seek assistance in presenting his Title II (DIB)
5 claim, but also, as discussed below, to allow further development of
6 the record and obtain medical expert testimony to establish onset of
7 disability. *Cox*, 587 F.2d at 991.

8 **B. Onset Date in Disabilities of Non-traumatic Origin**

9 The onset date represents the date upon which Plaintiff is
10 disabled and, therefore, eligible for benefits. The establishment
11 of the onset date is especially critical in Title II (DIB) cases,
12 because it may affect whether Plaintiff is eligible for past earned
13 benefits, and if so, the amount he can be paid. *See Social Security*
14 *Ruling (SSR)* 83-20. Where disability is caused by a distinct
15 trauma, and medical documentation is available to establish the date
16 of trauma and severity of impairment, the Commissioner may base a
17 finding of onset on evidence from acceptable medical sources. *Id.*
18 However, in progressive diseases, such as degenerative disk disease,
19 the date of onset is frequently unclear, and inferences must be made
20 to establish this critical finding. *Id.*

21 In establishing an onset date for a non-traumatic disability
22 such as Plaintiff's progressive spine disease and
23 hyperparathyroidism,² the Commissioner considers (1) the allegations
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25 ² The medical evidence indicates Plaintiff's hyper-
26 parathyroidism and resulting over-production of calcium aggravated
27 the spine degeneration, and medical sources were uncertain which
28 condition was causing Plaintiff's joint pain and other symptoms. It

1 of the claimant; (2) the medical evidence; (3) the claimant's work
2 history; and (4) other evidence concerning the severity of the
3 impairments. *Morgan v. Sullivan*, 945 F.2d 1079, 1082 (9th Cir. 1991)
4 (*citing SSR 83-20*). Where a condition is progressive, and medical
5 evidence does not establish a precise date of onset, "informed
6 inferences" must be made by a qualified medical expert. *Id.* at
7 1083. Without a legitimate medical basis on which to base an onset
8 of disability date, failure to call a medical expert to assist in
9 inferring the onset date is reversible error. *Armstrong v.*
10 *Commissioner of the Social Sec. Admin.*, 160 F.3d 587, 589 (9th Cir.
11 1998).

12 Here the ALJ found Plaintiff was disabled by symptoms from his
13 severe musculoskeletal disorder and hyperparathyroidism, with an
14 onset date of March 1, 2006. (Tr. 17.) He based the onset date on
15 submitted medical records dated from March 2006 through May 2007,
16 (Tr. 189-426), and Plaintiff's testimony that he was self-employed
17 through 2005. (Tr. 13, 17.) In support of the March 1, 2006, onset
18 date, the ALJ reasoned that (1) there were no medical opinions from
19 any acceptable medical sources prior to March 1, 2006, and (2)
20 Plaintiff "gave no explanation as to why he had not sought medical
21 treatment for his alleged symptoms prior to March 2006." (Tr. 17.)
22 These findings are neither legally sufficient to establish onset nor
23 supported by substantial evidence.

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25 appears the two conditions in combination increased significantly
26 the severity of physical impairments and, at times, caused mental
27 problems including depression. (Tr. 263, 291, 315, 387, 414-15,
28 421, 424-36.)

1 While it is true that Plaintiff has the burden to prove
2 disability, which he did, the adjudicator's inferences regarding
3 onset date must be supported by legitimate medical evidence. SSR
4 83-20. The ALJ had a duty, at a minimum, to re-contact Dr. Huebner
5 and obtain medical expert testimony in these proceedings where there
6 was substantial evidence of a serious progressive disease in
7 combination with other impairments, and Plaintiff was unrepresented
8 and had articulated his confusion regarding the evidentiary
9 requirements for Title II claims at the hearing.

10 Further, the Commissioner has stated in his policy ruling that
11 an adjudicator must not draw inferences about an individual's
12 symptoms and their functional effects from a failure to seek or
13 pursue regular medical treatment without first considering
14 claimant's explanation for his failure to seek treatment. SSR 96-
15 7p. Indeed, the SSR regulations direct the ALJ to question a
16 claimant at the administrative hearing to determine whether there
17 are good reasons for not pursuing medical treatment in a consistent
18 manner. *Id.* Such reasons may include that the claimant is living
19 with symptoms; financial concerns prevent the claimant from seeking
20 treatment; the claimant has been told that there is no further,
21 effective treatment that would be of benefit; and the claimant
22 structures his daily activities so as to minimize symptoms to a
23 tolerable level or eliminate them entirely. *Id.* Disability
24 benefits may not be denied because of a claimant's inability to
25 obtain treatment due to lack of funds or insurance. *Gamble v.*
26 *Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Nor can a failure to seek
27 treatment be a primary basis for an adverse credibility finding.
28 *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007).

1 Here, Plaintiff testified that prior to receiving State
2 benefits in March 2006, he did not have the financial resources to
3 get medical attention, that he was homeless, unemployed and took
4 only aspirin for pain relief. (Tr. 37, 195, 353.) These are
5 legitimate explanations for his failure to seek medical treatment,
6 and they are supported by the record. For example, the agency
7 reports indicate Plaintiff attempted to work less, with different
8 duties, but was not working at substantial gainful activity levels
9 after 2003.³ (Tr. 116, 123, 127.) Plaintiff consistently reported
10 he was homeless or living with friends or relatives since being
11 unemployed. (Tr. 32, 135, 268, 303.)

12 The ALJ's finding that prior to March 1, 2006, Plaintiff's
13 statements were not credible, but after this date, his symptom
14 complaints were reliable, is not supported by "clear and convincing"
15 reasons. (Tr. 17.) Where credibility is an issue, the ALJ must
16 make findings sufficiently specific to permit the court to conclude
17 the ALJ did not arbitrarily discredit claimant's allegations.
18 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell*
19 *v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). As
20 discussed above, Plaintiff's failure to seek medical attention prior
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22 ³ The record also shows Plaintiff had a significant work
23 history that would entitle him to DIB payments if he were found
24 disabled prior to December 2005. (Tr. 116-20.) The ALJ did not
25 contact prior employers or medical sources identified in the record
26 to ascertain what impact Plaintiff's impairments have had on his
27 ability to work, and for how long his symptoms have been at the
28 severity noted in March 2006.

1 to receiving benefits is not sufficient to reject totally
2 Plaintiff's subjective complaints relating to his condition prior to
3 his date of last insured.

4 Plaintiff argues because of the severity of his disability as
5 of March 2006, the ALJ should have been able to find him disabled
6 prior to November 2005; he also suggests that this court should
7 infer an onset date prior to the expiration of his insured status.
8 (Ct. Rec. 14 at 14-16.) However, when precise evidence is not
9 available, and inferences must be made to establish an onset date,
10 the record must be developed further, and medical expert testimony
11 should be obtained. SSR 83-20. Although the evidence is conclusive
12 regarding the severity of Plaintiff's condition by the date of the
13 ALJ's decision, there is no definitive evidence to guide the ALJ in
14 establishing onset - either before or after the date of last
15 insured. It is noted on independent review that Dr. Grimes, an
16 internal medicine specialist, found Plaintiff not disabled as of
17 July 2006. (Tr. 289-91.) In April and May 2006, Plaintiff was
18 diagnosed with high levels of calcium production and a parathyroid
19 adenoma, which was surgically removed in July 2006. (Tr. 315-17,
20 319-20, 394.) Dr. Hillard, neurology specialist from the University
21 of Washington, examined Plaintiff in November 2006, and found he had
22 good strength in his upper and lower extremities and normal gait, in
23 spite of noted compression of the spinal cord. (Tr. 379-80.) In
24 January 2007, treating family physician Jeff Huebner, M.D., opined
25 that Plaintiff was disabled from the effects of surgery (in July
26 2006) to resolve his hyperparathyroidism in combination with his
27 severe degenerative disc disease, arthritis, and depression. (Tr.
28 419.) Thus, there is conflicting, ambiguous medical evidence as to

1 the onset of Plaintiff's disability.

2 Remand for medical expert testimony and additional findings is
3 necessary. The medical evidence is complex, and the impact of
4 Plaintiff's hyperparathyroidism on his musculoskeletal impairments
5 needs to be evaluated fully by a qualified medical expert, who has
6 the advantage of reviewing the record in its entirety. *See Morgan*,
7 945 F.2d at 1082-83; SSR 83-20. On remand, Plaintiff may obtain
8 legal counsel and may submit additional medical records relating to
9 his condition prior to the date of last insured. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
12 **GRANTED** and the matter is remanded to the Commissioner for
13 additional proceedings consistent with the decision above and
14 pursuant to sentence four of 42 U.S.C. § 405(g);

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
16 **DENIED;**

17 3. Application for attorney's fees may be filed by separate
18 motion.

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

22 DATED July 22, 2009.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
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